

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CHESTER BOWLES, Administrator, Office of
Price Administration, Appellant,
vs.

NORTHWEST POULTRY AND DAIRY PROD-
UCTS COMPANY, (an Oregon corporation),
and C. W. NORTON, President, Appellees.

Appellees' Petition For Rehearing

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Deputy Administrator for Enforcement,
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To the Honorable Judges of said court, GARRECHT, DENMAN and HEALY:

Your petitioners, appellees herein, respectfully petition the court for a rehearing in said matter and for the dismissal of said proceedings upon the following grounds:

I.

The court is without jurisdiction in the premises.

II.

The proceeding before the court is not one authorized by the Emergency Price Control Act, or by any other law, or by any practice. It is not a suit or action. It is not due process of law. It is a nullity.

ARGUMENT.

The character of this proceeding was not adequately scrutinized by the appellees or their attorney, and the fact that no subpoena was issued or served on the appellees was not noticed by them, until after the decision in this court. This oversight is a matter of great regret. However, since the question of jurisdiction may be raised at any stage, it is taken for granted that the court will not, because of that oversight, refuse to consider this petition.

THE PROCEEDINGS.

1. The appellant filed in the court below an application for an order permitting inspection of records under Section 202 (b) of the Emergency Price Control Act, hereinafter referred to as the Act. (R. 340).

Section 202 (b) reads as follows:

“(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.”

Jurisdiction was claimed under Section 202 (e) of the Act, (R. 341) which reads as follows:

“(e) In case of contumacy by, or refusal to obey a subpoena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).”

Reference is made to Section 202 (a) of the Act (R. 341), whereby it is made unlawful for any person to sell or deliver any commodity, or otherwise to do or to omit to do, any act, in violation of any regulations or under Section 2, or of any regulation, or order or requirement under Section 202 (b).

Section 202 (a) reads as follows:

“SEC. 202. (a) The Administrator is authorized to make such studies and investigations, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.”

Section 205 (a) reads as follows:

“SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.”

2. Upon this application the appellant prayed for an order requiring the appellees to show cause why an

order should not issue requiring them to permit the inspection and copying of the records described in the Inspection Requirement mentioned at page 343 of the record.

A copy of the Inspection Requirement is attached to the application as Exhibit "A" (R. 344 and 345). This is a requirement to permit representatives of the Office of Price Administration to inspect the records of the appellees covering a certain period.

Exhibit "B" attached to the application is an affidavit to the effect that a request was made orally for permission to examine the records and that, this being refused, the "Inspection Requirement" was "served" on the appellees by a representative of the Office of Price Administration.

No subpoena was issued. No action or suit was instituted.

These sections of the Act, reduced to simple terms, prescribe:

(1) It is made unlawful for any person to violate any regulation, order or requirement thereof.

(2) The Administrator is authorized to make investigations and obtain information deemed by him necessary in the enforcement of the Act, and to require persons engaged in the business covered by the Act to keep records and permit inspection thereof.

(3) He may, by subpoena, require any person engaged in such business to appear in court to testify and produce documents.

(4) In case of refusal to obey a subpoena, an order of the court may issue on the application of the Administrator requiring such person to appear, give testimony and produce documents — a subpoena duces tecum.

(5) He is also authorized by Section 205 (a) to make application to the court for an order enforcing compliance with the provisions of the Act, by injunction or other order.

Construing these provisions together, showing of a violation of the Act and the issuance of a subpoena and disobedience thereof would seem to be jurisdictional prerequisites to the validity of any such order as was issued here.

The only thing that preceded the application was the "Inspection Requirement", which, as above noted, charged no violation of the Act and simply required permission to inspect and copy records, which it is said that the administrator believes would "constitute evidence which is competent, relevant and necessary in the said investigation * * * (R. 343).

Under the universal practice of the courts, such evidence is procurable by means of a subpoena in an appropriate suit or action. Nothing in the Act indicates that Congress attempted to depart from this practice, or to substitute for it a new procedure, except that the Administrator is authorized to issue a subpoena. Nothing in the Act confers jurisdiction on the court to enforce an "Inspection Requirement." That instrument is not a summons or a subpoena, and

yet on that alone is based the application in this case for an order permitting the inspection.

Such a procedure is not due process of law. From a legal point of view it is meaningless.

It seems clear that what Congress intended to legislate, was to authorize the Administrator to secure evidence in the time honored, constitutional manner, under a subpoena issued by the Administrator, or by the court in an appropriate suit or action wherein was charged a violation of the Act. This the Administrator is in effect authorized to do by subsections (b) and (c), which is to the effect that for the purpose of obtaining information he may by a subpoena, require the person in question to appear and testify and to produce documents. This would have been the proper step to take after refusal to comply with the "Inspection Requirement." Then, should the subpoena have been disobeyed, he could have applied to the court for an order requiring the person to appear and testify and produce documents or he could have filed suit and have obtained a subpoena from the court.

The steps to be taken, therefore, are:

(a) The issuance and delivery of a notice to permit inspection.

(b) The issuance of a subpoena for the inspection, or duces tecum.

(c) The issuance of application for, and the order commanding the recalcitrants to appear and testify.

The Administrator issued no subpoena, obtained no

subpena or order, but stood upon the notice alone, as if it were a complaint, a summons, or a subpena — a procedure unauthorized by any law and unknown to the practice of this or any other court.

The decision of the lower court should be affirmed and the proceedings ordered expunged from the records.

Respectfully submitted,

BARDI G. SKULASON,

Attorney for Petitioners,
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Portland, Oregon.

I hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

BARDI G. SKULASON,
Attorney for Petitioners.

